

9 FAM 41.2 NOTES

(CT:VISA-855; 11-22-2006)

(Office of Origin: CA/VO/L/R)

9 FAM 41.2 N1 WAIVER FOR ALIENS RESIDING IN CANADA OR BERMUDA

9 FAM 41.2 N1.1 Common Nationality Includes Commonwealth Countries and Ireland

(TL:VISA-164; 04-25-1997)

The waiver of passport and visa requirements provided by 22 CFR 41.2(b) for permanent residents of Canada or Bermuda who have a common nationality with Canadians or with British subjects in Bermuda, is considered to include citizens of all Commonwealth countries, as well as citizens of Ireland. (See 9 FAM 41.2 Exhibit I.)

9 FAM 41.2 N1.2 Stateless Alien Resident of Canada or Bermuda not Entitled to Waiver

(TL:VISA-367; 03-11-2002)

Permanent residents of Canada or Bermuda who are nationals of one of the Commonwealth countries listed in 9 FAM 41.2 Exhibit I may be granted a waiver of visa and passport requirements. An alien resident of Canada or Bermuda who is the bearer of a certificate of identity or other stateless person's document issued by the government of one of these countries may not benefit from the waiver.

9 FAM 41.2 N2 Waiver for British Subjects Attached to Canadian and British Government Organizations in Canada

(TL:VISA-164; 04-25-1997)

British subjects and their families attached to Canadian or British Government organizations in Canada, including the military, though not "permanent residents," may be regarded as nationals of Canada and eligible

for the waiver provided under 22 CFR 41.2(a).

9 FAM 41.2 N3 CONDITIONS FOR ADMISSION OF ALIENS UNDER DIRECT-TRANSIT WAIVER

(TL:VISA-596; 11-14-2003)

NOTE: The Transit Without Visa (TWOV) Program has been suspended until further notice.

9 FAM 41.2 N3.1 Not All Aliens Eligible for Transit Without Visa (TWOV)

(CT:VISA-855; 11-22-2006)

The Department's regulation at 22 CFR 41.2(i) and the *Department of Homeland Security* (DHS) companion regulation at 8 CFR 212.1(f) outline the conditions under which TWOV will be authorized and provide a list of countries whose nationals are ineligible to TWOV.

9 FAM 41.2 N3.2 Guidelines for Interpretation of 8 CFR 214.2(c)

9 FAM 41.2 N3.2-1 Journey Continued Within 8 Hours

(TL:VISA-2; 08-30-1987)

If an alien intends to transit the United States using the same conveyance throughout, the journey must be continued within 8 hours after arrival from foreign territory.

9 FAM 41.2 N3.2-2 Scheduled Stops

(TL:VISA-2; 08-30-1987)

The number of times the same conveyance on which the alien is traveling makes scheduled stops after leaving the port of entry is irrelevant, as is the total elapsed time at subsequent stopovers.

9 FAM 41.2 N3.2-3 Change of Transportation

(TL:VISA-2; 08-30-1987)

Should the alien find it necessary to transfer to connecting transportation to accomplish the trip, equipment may be changed no more than twice, and the

total elapsed on-ground time spent in transferring must not exceed 8 hours. However, if there is no scheduled transportation in that 8-hour period, continuation of the journey thereafter on the first available transport is acceptable. Time spent at the point of entry and at stopovers, for reasons other than for change of equipment, need not be computed in determining whether TWOV is permissible.

9 FAM 41.2 N3.2-4 Scheduled Change of Transportation and 8-Hour Rule

(TL:VISA-2; 08-30-1987)

If more than one conveyance is required for transit, the alien must be scheduled to leave the port of entry within 8 hours, and the total amount of time scheduled for stops at points where transfers of equipment occur must be less than 8 hours.

9 FAM 41.2 N3.3 Exception to 8-Hour Rule for Crew Members Joining Vessel or Aircraft

(TL:VISA-187; 03-30-1999)

An exception to the 8-hour rule is provided for crew members arriving in transit to join a vessel or aircraft. Such crew members arriving in transit need not be in possession of a C-1 visa. To qualify for admission in TWOV status, they must have valid D visas, and applicable clearances must have been processed.

9 FAM 41.2 N3.4 TWOV not Applicable to Cruise Ship Passengers

(TL:VISA-187; 03-30-1999)

Passengers on cruise ships that call at U.S. ports for brief periods and then proceed abroad do not qualify for TWOV status.

9 FAM 41.2 N3.5 Liability of Carrier in TWOV Cases

(TL:VISA-164; 04-25-1997)

A carrier bringing aliens to the United States under this provision may be subject to a civil penalty of \$2,000.00 if the alien does not comply with the terms of the regulations. Aliens under the bonded transit waiver may not, under any circumstance, change classification to another nonimmigrant status under INA 248.

9 FAM 41.2 N3.6 TWOV Procedure Does not Justify Refusal to Accept Visa Application

(*TL:VISA-33; 06-29-1990*)

The consular officer may not use the existence of the TWOV procedure to justify a refusal to accept an application for a transit visa.

9 FAM 41.2 N4 SIGNATORY TRANSPORTATION LINES

(*CT:VISA-855; 11-22-2006*)

See *9 FAM 41.2 Exhibit III* for a list of carriers which have contracts, including bonding agreements, with the Attorney General pursuant to INA 233(c) (*8 U.S.C. 1223(c)*) regarding aliens who are being transported in immediate and continuous transit through the United States. (See also *9 FAM 41.2 Exhibit II* for aliens of countries excepted from these contracts.)

9 FAM 41.2 N5 NATIVES AND RESIDENTS OF THE FREELY ASSOCIATED STATES NOT PROCEEDING IN DIRECT TRANSIT TO THE UNITED STATES

(*CT:VISA-855; 11-22-2006*)

A native and resident of the Freely Associated States (formerly the Trust Territory of the Pacific Islands), traveling to the United States, but not in direct and continuous transit, may be issued a nonimmigrant visa (*NIV*) without being charged the reciprocity fee. The visa may be valid for a period and number of applications for admission consistent with the traveler's needs. (See *Reciprocity Schedule* under country concerned for the number of applications and validity of visa.) The applicant, however, must pay the *machine readable visa* (MRV) fee, which is currently \$45.00.

9 FAM 41.2 N6 PAROLE PROCEDURE UNDER INA 212(D)(5)

(*CT:VISA-855; 11-22-2006*)

Consular officers may answer questions about the relationship between the parole procedure and the regular visa procedure under the INA with a reference to INA 212(d)(5) (*8 U.S.C. 1182(d)(5)*) that contains the

statutory authority for the parole procedure. Consular officers shall not give more information in answer to inquiries from the general public, nor shall consular officers suggest parole to an alien or an interested party. In appropriate cases, consular officers may refer inquirers to *DHS*.

9 FAM 41.2 N7 RESTRICTIONS ON BRITISH VIRGIN ISLANDS NATIONALS ENTERING U.S. VIRGIN ISLANDS UNDER WAIVER

(TL:VISA-187; 03-30-1999)

- a. A national of the British Virgin Islands, and resident therein, requires a passport, but not a visa if proceeding to the U.S. Virgin Islands.
- b. A national of the British Virgin Islands, and resident therein, requires a passport, but does not require a visa to apply for entry into the United States if such applicant:
 - (1) Is proceeding by aircraft directly from St. Thomas, U.S. Virgin Islands;
 - (2) Is traveling to some other part of the United States solely for the purpose of business or pleasure as described in INA 101(a)(15)(B);
 - (3) Satisfies the examining U.S. Immigration officer at that port of entry that he or she is admissible in all respects other than the absence of a visa; and
 - (4) Presents a current Certificate of Good Conduct issued by the Royal Virgin Islands Police Department indicating that he or she has no criminal record.

9 FAM 41.2 N8 VISA ISSUANCE TO ALIENS ENTITLED TO DOCUMENTARY WAIVER

(TL:VISA-344; 01-09-2002)

An alien entitled to a waiver of documentation may apply for and receive the type of visa that would otherwise be waived. If a visa is issued notwithstanding the waiver, the consular officer shall make a notation on Form DS-156, Nonimmigrant Visa Application, indicating that the visa was issued at the request of the applicant.

9 FAM 41.2 N9 K VISA ALIEN NOT ENTITLED TO NONIMMIGRANT VISA WAIVER

(CT:VISA-855; 11-22-2006)

An alien qualifying for a K visa as the fiancé(e) of a U.S. citizen is not entitled to a waiver of the *NIV* requirement regardless of circumstances.

9 FAM 41.2 N10 GUAM VISA WAIVER PROGRAM (GVWP)

9 FAM 41.2 N10.1 Requirements for Participation

(CT:VISA-855; 11-22-2006)

The Guam Visa Waiver Program, as authorized by the Omnibus Territories Act of 1986 (Public Law 99-396), was implemented on October 1, 1988. The program allows citizens of designated countries to make a temporary visit to Guam provided that they:

- (1) Visit for business or pleasure for a period of not more than 15 days;
- (2) Travel aboard a participating airline (see list of participating airlines);
- (3) Have a round-trip, nonrefundable and nontransferable ticket;
- (4) Have a completed and signed Form I-736, *Guam* Visa Waiver Information;
- (5) Waive any right otherwise provided in the Act to administrative or judicial review, or appeal of an immigration officer's determination of admissibility; and
- (6) Do not apply for an extension of stay, adjustment of status, change of nonimmigrant status, or onward travel to another destination in the United States.

For DHS regulations regarding the Guam Visa Waiver Program, see 8 CFR 212.1(e).

9 FAM 41.2 N10.2 Countries Eligible to Enter Guam Without Visa

(TL:VISA-596; 11-14-2003)

See 8 CFR 212.1(e)(3).

9 FAM 41.2 N11 VISA WAIVER PROGRAM (VWP)

(CT:VISA-855; 11-22-2006)

- a. The Visa Waiver Program (VWP) was established by section 313 of the Immigration Reform and Control Act of 1986 (Public Law 99-603). It provided for the visa-free entry of nationals of designated countries coming to the United States for tourism or business (B visa purposes) for a period not to exceed 90 days, provided they arrive on a participating carrier and are in possession of a round-trip or onward ticket.
- b. The Immigration Act of 1990 (Public Law 101-649) removed the eight-country cap and extended the pilot program for the original eight countries as well as any other countries designated by the Secretary of State and the Attorney General until September 30, 1994.
- c. The Immigration and Nationality Technical Corrections Act of 1994 (Public Law 103-416) further extended the program through September 30, 1996, and created a probationary status for participating countries in the Visa Waiver Pilot Program (VWPP).
- d. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208) eliminated the joint action requirement by amending the law to allow the Attorney General to act "in consultation with the Secretary of State" rather than "jointly with the Secretary of State" in designating the countries eligible to participate in the program. The program was further extended until September 30, 1997, and repealed section 217(f) that permitted countries to enter the program in probationary status.
- e. Public Law 105-173 of April 28, 1998, amended the Immigration and Nationality Act to modify and extend the VWPP through April 30, 2000.
- f. On October 30, 2000, the President signed the Visa Waiver Permanent Program Act, making the VWPP permanent. The new legislation (Public Law 106-396), also amended the criteria for admission to, and continuation in, the program. The program is now known as the Visa Waiver Program (VWP). *The existence of the program* no longer has to be periodically reviewed, nor does it have an expiration date.

9 FAM 41.2 N11.1 Countries Eligible to Participate in VWP

(CT:VISA-855; 11-22-2006)

The VWP waives the *NIV* requirement for admission of certain aliens into the United States for a period not to exceed 90 days. The Attorney General, after consulting with the Secretary of State, is authorized to designate those countries eligible to participate in the VWP.

Applicants for entry under the VWP must complete Form I-94-W, Visa Waiver Nonimmigrant Arrival/Departure Document, prior to arriving at the port of entry, and must undergo screening at the port of entry by the DHS. Form I-94-W makes clear that the waiver traveler surrenders the right to an exclusion hearing.

9 FAM 41.2 N11.4 Round-Trip Ticket

(TL:VISA-367; 03-11-2002)

For purposes of the VWP, a round-trip ticket means any nontransferable ticket, valid for a period of not less than one year, which takes the traveler out of the United States to an onward destination, including foreign contiguous territory or adjacent island, if he or she is resident there. If the traveler is not resident in contiguous territory or adjacent islands, the ticket must transport him or her to a foreign location outside contiguous territory or adjacent islands.

9 FAM 41.2 N11.5 Port of Embarkation for *the* United States

(CT:VISA-855; 11-22-2006)

Participants in the VWP may embark for the United States from anywhere in the world, provided they arrive aboard a participating carrier.

9 FAM 41.2 N11.6 Aliens Transiting *the* United States

(CT:VISA-855; 11-22-2006)

A VWP applicant may transit the U.S. to Canada or Mexico if the end destination is not in either country, unless the traveler is a resident of Canada or Mexico. The return through the U.S. must be within the original 90 days granted under the VWP. If it is greater than 90 days, the traveler must be able to show that his intent in returning to the U.S. is not to circumvent the immigration law.

As per 8 CFR 217.2 (c) (1):

(c) Restrictions on manner of arrival. (1) Applicants arriving by air and sea. Applicants must arrive on a carrier that is signatory to a Visa Waiver Pilot Program Agreement and at the time of arrival must have a round trip ticket that will transport the traveler out of the United States to any other foreign port or place as long as the trip does not terminate in contiguous territory or an adjacent island; except that the round trip ticket may transport the traveler to contiguous territory or an adjacent island, if the traveler is a

resident of the country of destination.

9 FAM 41.2 N11.7 Side Trips Permitted Within 90-Day Limit

(TL:VISA-596; 11-14-2003)

Travelers participating in the VWP must make their initial entry into the United States aboard one of the participating carriers. After their initial entry into the United States, under the provisions of VWP, a foreign national may temporarily depart to, and return from, Canada, Mexico or adjacent islands by car or other carriers as long as the total stay in the United States and the time accrued in contiguous territory and/or adjacent islands does not exceed 90 days. (For further information see Chapter 15.7(i) of the DHS Inspectors Field Manual, Readmission After Departure to Contiguous Territory or Adjacent Islands.)

9 FAM 41.2 N11.8 Nationality and Passport Requirements

9 FAM 41.2 N11.8-1 Nationality Is Determinative for VWP Purposes

(TL:VISA-596; 11-14-2003)

The traveler's nationality, not place of birth, determines entitlement to participate in the VWP. Passports must reflect the nationality of a participating country.

9 FAM 41.2 N11.8-2 VWP and the United Kingdom

(TL:VISA-596; 11-14-2003)

For the purposes of VWP, "United Kingdom" refers only to British citizens who have the unrestricted right of permanent abode in the United Kingdom (i.e., England, Scotland, Wales, Northern Ireland, the Channel Islands and the Isle of Man). Accordingly, with respect to VWP travel, the term "United Kingdom" does not apply to British citizens abroad, or to citizens of British Commonwealth countries.

9 FAM 41.2 N11.8-3 Using Official and Diplomatic Passport to Enter the United States

(CT:VISA-855; 11-22-2006)

Bearers of official and diplomatic passports can use the VWP, provided they

are entering the United States for a B visa purpose. If they are coming for a(n) A or G purpose, including a temporary assignment of less than 90 days, the appropriate visa must be *placed* in the passport.

9 FAM 41.2 N11.9 Aliens Requiring Waiver of Ineligibility

(TL:VISA-855; 11-22-2006)

Persons for whom a waiver of ineligibility is required must apply for and receive a visa; they are not eligible to participate in the VWP. Persons covered by the blanket waiver of INA 212(a)(1) (*8 U.S.C. 1182(a)(1)*) for mentally retarded individuals can participate in the VWP, if otherwise qualified, and accompanied by a responsible adult; the blanket waiver will be noted on Form I-94, Arrival *and* Departure Record, at the port of entry.

9 FAM 41.2 N11.10 Travelers not to Be Discouraged from Seeking Visas

(CT:VISA-855; 11-22-2006)

- a. Although use of the VWP is encouraged, travelers availing themselves of *the program* should be made aware of the risks involved and the surrendering of certain rights. Consequently, they should not be discouraged from seeking normal visa services.
- b. *When a traveler opts to apply for a visa in lieu of choosing to travel under the VWP, consular officers must apply the same U.S. immigration law standards to the case that they would to any other visa applicant.*
- c. *It is important to remember that although a traveler may come from a VWP country, this does not necessarily mean that he/she qualifies for VWP travel.*

9 FAM 41.2 N11.11 Maintenance of Status

(TL:VISA-367; 03-11-2002)

An alien admitted to the United States under the VWP:

- (1) Is admitted as a visitor for business or pleasure for a period not to exceed 90 days;
- (2) May not engage in activities inconsistent with status as a visitor;
- (3) Is not eligible for an extension of temporary stay in the United States;
- (4) Is not eligible for adjustment of status to that of a lawful permanent resident alien (other than as an immediate relative as defined under

- INA 201(b) or under the provisions of INA 245(i); and
- (5) Is not eligible for change of nonimmigrant status.

9 FAM 41.2 N11.12 Refusals to National of Country under Consideration for VWP

(TL:VISA-391; 04-10-2002)

Consular officers shall not refuse visas under a refusal category that is not included in the calculation of the visa refusal rate for VWP purposes. In other words, consular officers shall not knowingly refuse visas under INA 221(g) instead of INA 214(b) in order to lower the refusal rate for VWP purposes.

9 FAM 41.2 N11.13 Report for Country under Consideration for VWP

(TL:VISA-391; 04-10-2002)

- a. On May 1 of each year, for any country that is under consideration for inclusion in the VWP, posts must report:
- (1) The total number of nationals of the country who applied for U.S. visas in that country during the previous calendar year;
 - (2) The total number of applicants issued and refused visas;
 - (3) A breakdown of the refusals by refusal category; and
 - (4) The refusal rate under INA 214(b) refusals.
- b. The chief of mission must certify the accuracy of the information provided.

9 FAM 41.2 N11.14 Applicant Applying Outside His and/or Her Country

(TL:VISA-391; 04-10-2002)

A national of a VWP participating country need not be residing in his and/or her country in order to make application for the VWP.

9 FAM 41.2 N12 CANADIAN CITIZENS SEEKING ADMISSION AS TREATY TRADERS OR TREATY INVESTORS

(TL:VISA-164; 04-25-1997)

During the United States-Canada Free Trade Agreement negotiations, it was recognized that the E visa classification is extremely technical and sometimes quite complex. All parties agreed that the visa process was the best way to accord this classification. 22 CFR 41.2(m) removes the visa exemption for Canadian citizens who seek to enter the United States as treaty traders/investors under INA 101(a)(15)(E). Such Canadian citizens must apply for an E visa at a U.S. embassy or consulate. (See 9 FAM 41.51 Regs/Statutes and 9 FAM 41.51 Notes.)

9 FAM 41.2 N13 CANADIAN CITIZENS SEEKING ADMISSION UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

(TL:VISA-164; 04-25-1997)

Citizens of Canada seeking admission to the United States under provisions of the NAFTA are exempt from the visa requirement, unless seeking classification under INA 101(a)(15)(E). (See also 9 FAM 41.59.)